

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Copyright 1936, by the University of Pennsylvania

VOLUME 84

JANUARY, 1936

No. 3

THE LIMITS AS TO EFFECTIVE FEDERAL CONTROL OF THE EMPLOYER-EMPLOYEE RELATIONSHIP

ALPHEUS T. MASON †

It is customary among economists to describe the employer-employee relationship as "inter-group." Strictly speaking this phrase is not applicable to American conditions. There are surprisingly few group relationships in our industry, either on the side of employers or of employees. The employer is one, personally or corporately, not a group. Furthermore, despite strenuous efforts of employers, under NIRA,¹ and of trade-unionists, since the last quarter of the nineteenth century, to organize their workers, there are many employees still bargaining individually, and not collectively.² Under existing conditions, the work of establishing group relations in American industry is like trying to build stone walls on the flanks of a

† A. B., 1920, Dickinson College; A. M., Ph. D., 1923, Princeton University; author of *ORGANIZED LABOR AND THE LAW* (1925); *BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE* (1933); *The Right to Strike* (1928) 77 U. OF PA. L. REV. 52; *The Labor Decisions of Chief Justice Taft* (1929) 78 U. OF PA. L. REV. 585; and numerous other articles in various periodicals; Associate Professor of Politics, Princeton University.

1. 48 STAT. 195, tit. I (1933), 15 U. S. C. A. §§ 707-712 (Supp. 1934).

2. In November, 1933, the National Industrial Conference Board made a nation-wide survey to determine the extent of collective bargaining under NIRA; 3,314 companies, employing an aggregate of 2,585,740 workers, with capitalization of \$500,000 or over in manufacturing and mining, were covered. This survey showed 45.7 percent dealing individually with their employers, 45 percent dealing through employee-representation plans and 9.3 percent dealing through labor unions. For detailed results of this survey, see *INDIVIDUAL AND COLLECTIVE BARGAINING UNDER THE N. I. R. A.* (1933), issued by the National Industrial Conference Board, Inc.

A similar survey, made in May, 1934, did not indicate any great change from the situation in November 1933. This more recent investigation showed that the proportion of total wage earners dealing individually with their employers had declined from 46.1 percent of the total to 40 percent; the proportions dealing through employee representation had increased from 44.9 percent to 49.6 percent, and the proportion dealing through labor unions had increased from 9 percent to 10.4 percent. For detailed results, see *INDIVIDUAL AND COLLECTIVE BARGAINING IN MAY, 1934* (1934), issued by the National Industrial Conference Board, Inc. The 1933 totals given in the second paragraph of this note differ from those given in the first, because only 89.8 percent of the companies in the November survey responded in May, and it was therefore necessary to recompute the November data for the companies that replied in May in order to show exactly what shifts had occurred within this group of companies between November and May.

volcano; the materials are there but not the foundation. Since these preliminary fundamentals have yet to be established in American industry, peace is a dream.

Other countries have approached this problem in a variety of ways. Long before Mussolini and Hitler outlawed strikes and lockouts in Italy and Germany, respectively, Australia had taken the bull by the horns and set up a system of compulsory arbitration which prevented strikes. Canada, the Scandinavian countries, and others, provided years ago for a compulsory waiting period during which strikes cannot be legally undertaken. Meanwhile the government investigates the points at issue and attempts conciliation.

It is extremely doubtful whether the Fascist and Nazi policy of punishing unions for strikes and employers for lockouts, when these seem bad to governmental agents, can be made to conform with British and American principles of democracy. And once it is agreed that in a democracy government cannot maintain industrial peace by sheer force, then voluntary agreements between organized labor groups and employers' associations must be encouraged. This, at any rate, has been the traditional British policy. In pursuance of it England has enjoyed a degree of industrial peace far exceeding our own.

For over a generation in England, wages, hours and working conditions have been regulated and adjusted by industry-wide agreements between trade-unions and management with arbitration playing a leading role. Conceding that this democratic method is the one most congenial to our own traditions, and that the evolution of our industrial relations seems likely to lead ultimately to this same stage of development, it may be worthwhile to consider certain points of contrast and comparison. Then, I think, we can appraise recent legislation, such as the NIRA and the Wagner Labor Disputes Act, more properly known as the National Labor Relations Act.³ This discussion is confined to such historical and economic aspects of our industrial relations as seem to have definite bearing on the efficacy of this legislation.

By the generosity of the Social Science Research Council I was enabled to spend the summer in England where I could observe the British industrial system at close range. Though mindful of many factors in our history and tradition that explain various striking contrasts, one discovers that there are differences in trade-union techniques, in the attitudes of industrialists, and in the scope and nature of governmental regulation. Consideration of such differences may be of service in evaluating the governmental controls which Congress has recently established in this field.

3. P. L. No. 198, 74th Cong., 1st Sess. (1935).

Perhaps the most impressive difference between English and American trade-unions is the greater numerical strength of the former, and this in a country one-third our population. As early as 1890 British trade-union membership numbered twenty percent of the adult male wage earners; in 1919 the proportion had reached seventy percent, *i. e.*, more than 8,000,000 workers. Though trade-union membership has declined considerably since then, it still numbers about fifty percent of the working population.⁴ In America, on the other hand, even with the stimulus and incentive furnished organizing activity by the New Deal, trade-unions, including those not affiliated with the A. F. of L., have hardly fifteen percent of our wage earners, or about 4,000,000 members.⁵ Of the 33,000,000 wage earners in the United States at least eighty-five percent are still dependent for the protection of their interests upon the benevolence of employers or the intervention of government.⁶ There are, of course, many reasons for the comparative weakness of American unions but the British strength is due, at least in part since 1890, to the organizing of their unskilled workers. (One significant result is that the processes of adjustment through agreement are functioning there in nearly all industries; while in America negotiations between organized labor and management have been developed in but a few lines. Only in industries having strong labor organizations (*e. g.*, railroads, construction and men's clothing trades) are labor disputes here settled in a manner comparable with British practice.

American unions are still predominantly "job conscious" rather than "class conscious" and this makes them aim at exclusive membership; they have signally failed to organize the mass of unskilled workers. The A. F. of L. was able to evade this issue until the San Francisco Convention of 1934 where a resolution was adopted approving industrial unions in the mass production industries. At first this was widely hailed as a "move to the left", but since the resolution provided careful safeguards for craft jurisdiction, certain persons doubted whether it represented anything more than a concession to the unions recently organized in such industries as cement, aluminum, and automobiles, wherein the A. F. of L. had made little or no progress. The struggle was renewed at the fifty-fifth annual Convention this year when John L. Lewis led a combative drive for integrated organization of the mass production industries. He charged that the old craft system was

4. For details as to trade-union membership in England, see J. H. RICHARDSON, *INDUSTRIAL RELATIONS IN GREAT BRITAIN* (1933) 42 *et seq.*; *id.*, Appendix IV.

In 1935, trade-union membership had declined to 3,388,810. See (Sept. 1935) *MINISTRY OF LABOR GAZETTE* 331.

5. For an able treatment of the organizing effects of NIRA, see McCabe, *The Effects of the Recovery Act upon Labor Organization* (1934) 49 *QUART. J. OF ECONOMICS* 52. See also Slichter, *The Future of Trade Unionism and Employee-Representation Plans* (March, 1934) *PERSONNEL SERVICE BULLETIN*.

6. See *LABOR AND THE GOVERNMENT* (Twentieth Century Fund, Inc. 1935) 24.

responsible for unionism's failure to enroll more than 3,000,000 of the nation's 33,000,000 wage earners, but the craft unionists triumphed by 18,025 votes to 10,924.

Another point of contrast is that American unions are far less closely knit than the English. There is in the United States no all-embracing organization such as the Trades Union Congress, which, since its founding in 1868, has gained more and more authority over its constituent parts. The nearest analogue is the American Federation of Labor, but that body is by its constitution denied any executive authority whatever over the federated societies. Moreover, the A. F. of L. does not include nearly all our total union membership; some of the most successful and powerful unions stand aloof from the Federation.⁷

Largely as a result of differences already mentioned, the bargaining power of American trade-unionists is far less than that of the British. This may explain why fixing wages and conditions of work by voluntary negotiation, long the normal course of procedure over there, is still so strongly resisted in America. Many of our industrialists claim absolute "right" to bargain with individual workers, or groups of workers, and to do so free from outside union or other "interference." This attitude was outgrown in England at least a generation ago.⁸ The wide chasm that separates the American industrialist's point of view from that of the English, may be indicated by representative statements of leading business men in the two countries. A distinguished English industrialist believes that "'collective bargaining' between highly organised negotiating bodies [trade-unions on the one hand and associations of employers on the other] has become so much the established usage that we take it for granted as if it were a part of the order of nature."⁹ Our contrasting attitude was stated recently by an eminent American industrialist as to the then pending Wagner Bill—a measure designed to impose collective bargaining upon employers by legislative fiat. "I would rather go to jail," he said, "or be convicted as a felon" than abide by the provisions of the Wagner Bill.¹⁰

7. *Id.* at 23.

8. For a brilliant comparison of American and British Trade Unionism, see RAMSAY MUIR, *AMERICA THE GOLDEN* (1927). Muir concludes that the American trade-union movement stands where British trade-unionism stood fifty years ago—that is, before the rise of unionism among the unskilled, and before the creation of the Labor Party. The attitude of American labor leaders, such as Gompers and Green, resembles that of such English leaders as Thomas Burt and Henry Broadhurst in the eighties of the last century.

9. Quoted from BRITAIN'S INDUSTRIAL FUTURE, BEING THE REPORT OF THE LIBERAL INDUSTRIAL INQUIRY (1928) 51. E. H. Gilpin, Director of Baker Perkins, Ltd., and member of the Executive Committee of the Liberal Industrial Inquiry, endorsed the above statement in an interview with the writer on August 3, 1935.

10. Arthur H. Young, Vice President of the United States Steel Corporation, in an address accepting a gold medal in recognition of "outstanding and creative work in the field of industrial relations." N. Y. Times, May 25, 1935, at 1. The award was the Henry Laurence Gault Medal of The Institute of Management of the American Management Association.

The American business man feels sure that in all labor relations he has an absolute right to conduct his own business in his own way, free from trade-union interference, and that this is a natural and constitutional prerogative. What E. H. Downey said fifteen years ago in his introduction to Hoxie's *Trade Unionism in the United States*,¹¹ is still fairly representative of our industrialist point of view:

"The business man's right to employ or discharge whom he will, . . . to set industry in motion or break off the productive process whenever he sees his own advantage in so doing . . . [are] rights involved in the legal conceptions of private property and free enterprise; . . . in support of them the business man can appeal to the courts, the police and even the military arm of the state. A challenge to these prerogatives of business enterprise is in some sort a challenge to the existing social organization."

The author of the previously quoted Wagner Bill statement is a leading advocate of company unionism. Now company unions exist in England too, but there they play a very subordinate role.¹² There the works council or company union does not supplant the trade-unions but continues alongside of, and is supplementary to, them. Since there is no question as to the dominant and exclusive authority of the trade-union to negotiate with employers' associations as to terms and conditions of employment, British labor has taken a somewhat neutral attitude toward works councils. There is nothing of the bitter hostility which is so characteristic of American labor leaders and sympathizers, the reason being that works councils are nothing more than local organizations comprising representatives of management and of labor, for dealing with local conditions outside the scope of collective agreements.

Equally fundamental are wide differences as to political objectives and activities of British and American labor movements. Until 1890 their aims were much the same; both were limited to improving the material and physical condition of the worker, though neither ignored the importance of supporting legislative candidates sympathetic with their interests. During the last decade of the nineteenth century British labor went in for greater activity in the political field. Rather than trust political representatives, almost always chosen from the ranks of capital, to safeguard and promote their rights in Parliament, British trade-unionists backed their own candidates. A trade-union leader, speaking in 1894, used interesting and suggestive language in urging this:

11. (1920). The quotation following is at pp. xi, xii.

12. See in this connection, RICHARDSON, *op. cit. supra* note 4, c. 5; C. G. Renold, *Trade Unions or Company Unions* (1935) 29 SURVEY GRAPHIC 432.

"We must couple with trade-unionism political activity—in the sense of having some controlling hand in the administration of justice and the uses to which our national forces should be put in terminating industrial warfare. The social problem cannot be solved by the invocation of the constabulary and the powder and shot of our soldiery. Can we fairly expect the capitalists to make laws in the interest of the workers? . . . So long as the workers of the country allow themselves to be cajoled and led without volition in political matters, they will not devise any form of government for the purpose of expediting legislation favorable to the interest of labor. . . . We must realize sooner or later that it will be easier to fight the employer on the floor of the House of Commons than by the blunt methods of strikes which entail so much misery and suffering."¹³

Trade-unionism not only entered politics but set out to destroy the capitalist system and replace it by that of socialism. Since 1906 the Labor Party has had substantial membership in Parliament and on two occasions (1924 and 1929) His Majesty summoned a trade-unionist to form a government.

As early as 1885, certain American labor leaders envisaged similar gains to labor from taking part in politics. In the Federation of Organized Trades and Labor Unions of that year, Delegates Emrich and Bauer presented a resolution calling for an independent labor party.¹⁴ Experience had already proved that laws in favor of the working class could not be expected from capitalist legislators; that it would never be possible to elect real representatives of labor until the workingmen severed their connection with existing parties and created one of their own. This resolution was defeated, as all subsequent proposals for independent political action have been.

Samuel Gompers, whether for good or ill, held that the true field of trade-unionism was exclusively industrial, and he resisted strongly all attempts to form an independent labor party.¹⁵ This policy was bitterly criticised, but without effect, as recently as the A. F. of L. conventions of 1934 and 1935.¹⁶ The Federation still clings to its tradition of "rewarding

13. *An Appeal to Trade Unionists for Political Action*, an address by President J. H. Beever to the Halifax Trade and Labor Council, Feb. 28, 1894.

14. PROCEEDINGS OF THE CONVENTION OF 1885, 17. For an able discussion of the damaging effects of labor's refusal to present a united front in politics, see ROBERT HUNTER, *LABOR IN POLITICS* (1915).

15. On the political and labor philosophy of Gompers in particular and the American labor movement generally, see his autobiography, *SEVENTY YEARS OF LIFE AND LABOR* (1925); L. S. REED, *THE LABOR PHILOSOPHY OF SAMUEL GOMPERS* (1930); W. F. WALLING, *AMERICAN LABOR AND AMERICAN DEMOCRACY* (1926); MOLLIE R. CARROLL, *LABOR AND POLITICS* (1923).

16. See REPORT OF THE EXECUTIVE COUNCIL OF THE AMERICAN FEDERATION OF LABOR (1934). Proponents of resolutions calling for an independent labor party claim that had they been submitted and considered on their merits rather than smothered by parliamentary tactics, the resolutions would have received approximately 7000 votes.

As these words are written new proposals for an independent labor party are being offered in the A. F. of L. Convention at Atlantic City, N. J., but they are meeting the usual resistance at the hands of American labor leadership. See N. Y. Times, Oct. 8, 1935, at 8.

friends and punishing enemies" among the old parties. Gompers always insisted, moreover, that the function of organized labor was not to remake society but by common action to secure for its members higher wages and the best conditions that actual productive power allowed. Rather than foster class consciousness, labor leadership has held out to the workers the prospect that they themselves might ultimately become capitalists and employers of labor.¹⁷ The American worker has never thought of himself as different from his "boss" save as to income. This conservative or "frontier" policy continues under the leadership of William Green. Judging from the red-baiting in which Mr. Green has recently indulged, a politically radical laborite has about as much chance of access to the councils of the A. F. of L. as a Communist has of being enrolled by Jouett Shouse in the American Liberty League!¹⁸

Under trade-unionism which enrolls the unskilled and enjoys unified executive control and administration, with responsible leadership free from graft and rackets, with a political policy which places its own men in political positions where they not only safeguard labor against legal and political encroachments but also may lay the foundations for socialist society, the prestige of British labor is the envy of all other trade-unionists, and England has achieved a measure of industrial peace which will not be ours for a generation—if then.

This happier situation has resulted from the combined efforts of trade-unions and governments. Following widely divergent policies, both American and British labor have worked to achieve two main objectives: improvement in the legal status of trade-unions and social legislation for the material and physical benefit of the entire working population. In England credit for what so far has been achieved must go to organized labor, not to government. Such assistance as government has rendered in improving trade-union legal status has been corrective and supplementary; in this respect only

17. For an interesting discussion of the differences between American trade unionism and socialism in terms of social and political philosophy, see *THE DOUBLE EDGE OF LABOR'S SWORD, DISCUSSION AND TESTIMONY ON SOCIALISM AND TRADE-UNIONISM BEFORE THE COMMISSION ON INDUSTRIAL RELATIONS* (1912).

Both employers and labor have, as it appears, deliberately accentuated the already natural conservatism of American labor. The contributions of the management in this direction have taken the form of profit sharing, distribution of stock among employees, *etc.* The motives are obvious: companies sponsoring these schemes desire to avert industrial unrest by making their workers feel concern for the maintenance of dividends as well as wages.

Also, American labor itself has entered fields distinctly capitalistic, as in 1920 when it began to establish labor banks, investment companies, *etc.* Labor banks soon lost the last vestige of class objective. Organized for the purpose of using labor's money as a weapon in the struggle against capital, this notion disappeared when officers were confronted with the necessities of practical banking. "We carry on our business," one official told the author, "on strict banking principles. We do not allow ourselves to be influenced by sentimental considerations."

18. Drastic steps were taken at the fiftieth annual Convention of the A. F. of L. to purge unions of Communists, or of any persons advocating the violent overthrow of American institutions. See *N. Y. Times*, Oct. 7, 1935, at 1.

may it be said that government has taken the side of labor in the industrial struggle.

British labor, no less than American, has suffered from reactionary court decisions. The four leading English statutes affecting the status and activities of trade-unions were the immediate result of adverse judicial decisions that outraged public opinion.¹⁹ One of these, the Conspiracy and Protection of Property Act of 1875, relieved labor from the damaging effects of the doctrine of criminal conspiracy by declaring that a combination of two or more workers to do or procure any act in contemplation or furtherance of a trade dispute was not indictable as a conspiracy unless such act would be criminal if performed by a single individual. When George Ogder, in the Trade Union Congress of 1876, labeled this enactment as "the greatest boon ever given to the sons of toil",²⁰ he did not exaggerate labor's achievement; the legal battles of American labor prove it.²¹ In this country the doctrine of criminal conspiracy has always been, and still is, the legal thorn in the side of organized labor. It has formed the legal base for that injunction incubus so much heard of in America and so little known or used in England. Injunction cases from the *Debs* decision of 1895²² to the *Daugherty-Wilkerson* broadcast of 1922,²³ prove of what service this instrument is to American employers in their legal battles against labor.

Despite the Act of 1875, British trade-unions were still subject to civil liability for the acts of their officials, as shown by the *Taff Vale* decision of 1901.²⁴ In 1906, when representatives of the Labor Party first sat in Parliament, the ruling of that case was emphatically reversed by the Trade Disputes Act which made trade-union funds immune from suit for damages because of strike action, breach of contract, or otherwise.

19. I refer to the TRADE UNION ACT, 34 & 35 VICT. c. 31 (1871), which declared, *inter alia*, that the purposes of any trade union shall not, merely because they are in restraint of trade, be unlawful so as to make any member of such trade union liable for criminal conspiracy; the CONSPIRACY AND PROTECTION OF PROPERTY ACT, 38 & 39 VICT. c. 86 (1875); the TRADE DISPUTES ACT, 6 EDW. VII, c. 47 (1906); the TRADE UNION ACT, 2 & 3 GEO. V, c. 30 (1913), whose effect was to reverse the famous Osborne judgment of 1909 (*Amalgamated Society of Ry. Servants v. Osborne*, [1910] A. C. 87) which, if allowed to stand, would have wrecked labor's political objectives.

20. SYDNEY WEBB, SIXTY YEARS OF THE TRADE UNION CONGRESS.

21. The following cases may be cited as among the most famous: *In re Debs*, 158 U. S. 564 (1895); *Loewe v. Lawlor*, 208 U. S. 274 (1908); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 (1911); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917); *American Steel Foundries v. Tri-City Council*, 257 U. S. 184 (1921); *Bedford Co. v. Stone Cutters' Ass'n*, 274 U. S. 37 (1927); *Arthur v. Oakes*, 63 Fed. 310 (C. C. A. 7th, 1894); *Toledo, A. A. & N. M. Ry. v. Pennsylvania Co.*, 54 Fed. 730 (C. C. N. D. Ohio 1893); *United States v. Railway Employees' Dep't*, A. F. of L., 286 Fed. 228 (N. D. Ill. 1923); *International Organization v. Red Jacket Cons. Coal & Coke Co.*, 18 F. (2d) 839 (C. C. A. 4th, 1927).

22. *In re Debs*, 158 U. S. 564 (1895).

23. See *United States v. Railway Employees' Dep't*, A. F. of L., 283 Fed. 479 (N. D. Ill. 1922); s. c., 286 Fed. 228 (N. D. Ill. 1923); 290 Fed. 978 (N. D. Ill. 1923). Both the *Debs* and *Wilkerson* injunction orders are reprinted in full in FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 253 *et seq.*

24. *Taff Vale Ry. v. Amalgamated Society of Ry. Servants*, [1901] A. C. 426.

The experience of American labor is sadly different. A federal Act of 1890,²⁵ originally intended to outlaw trusts and big business combinations, embodied, according to the Supreme Court,²⁶ language broad enough to include labor activities.²⁷ And despite the pledges of national platforms, Republican and Democratic, and the persistent effort to secure reversal of the precedent established in the *Danbury Hatters' Case* in 1908,²⁸ that decision has never been overruled. The chief significance of the Sherman Act, thus interpreted, is that it elevates the old common law doctrine of criminal conspiracy to the status of modern federal law.

I have mentioned the English statutes as illustrating the sort of legislation which Parliament has enacted to protect and promote collective bargaining. It is significant, I think, that in no instance was legislation, professing to safeguard labor, drafted in such a way as to defeat labor's hopes. So much cannot be said of American labor legislation;²⁹ indeed, some of those very Congressional statutes on which labor based its fondest dreams and to which it accorded unbounded praise, have either turned out abortive, as were the labor clauses of the Clayton Act,³⁰ or unenforceable, as was Section 7 (a) of the Recovery Act.³¹ If American labor had had its own representatives in Congress during the debates on the Clayton Bill I doubt whether Mr. Gompers would have been deluded into thinking it anything other than the gold brick it was. He actually called it the "Magna Charta of labor." The one provision—denial of the conspiracy doctrine, civil and criminal, in labor disputes—which, if included, might have entitled this legislation to such high acclaim, was omitted. Congressman Hughes of New Jersey set out specifically to copy the English statutes but was unsuccessful. He finally had to admit that "there is nothing in this bill which goes so far as that. . . . This legislation falls far short, in a federal way, of what the British Parliament granted to its workingmen."³²

American labor has often spent its energies in efforts to attain such delusive objectives as the sterile and sonorous words of Section 6 of the Clayton Act: "The labor of a human being is not a commodity or article of commerce"³³—a beautiful phrase of no legal force or effect.³⁴ More re-

25. Sherman Anti-Trust Act, 26 STAT. 209 (1890).

26. *Lawlor v. Loewe*, 208 U. S. 274 (1908).

27. For an examination of congressional intent and judicial interpretation of this Act, see A. T. MASON, *ORGANIZED LABOR AND THE LAW* (1925) 119-167.

28. *Lawlor v. Loewe*, 208 U. S. 274 (1908).

29. See A. T. MASON, *The Labor Clauses of the Clayton Act* (1924) 18 AM. POL. SCI. REV. 489.

30. 38 STAT. 731, 738 (1914), 15 U. S. C. A. § 17, 29 U. S. C. A. § 52 (1927).

31. 48 STAT. 198 (1933), 15 U. S. C. A. § 707 (a) (Supp. 1934).

32. 51 CONG. REC. 13972 (1914).

33. 38 STAT. 731 (1914), 15 U. S. C. A. § 17 (1927).

34. Even after the Supreme Court's decision in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921), Gompers observed regarding this useless bit of verbiage: "That wonderful declaration, the first that has ever been made of the kind by any authoritative govern-

cently labor has pinned its hopes on a legal guarantee of the right to organize and bargain collectively through representatives of its own choosing, as if labor did not possess that right already, whenever and wherever strongly enough organized to secure it. One looks in vain through the English statutes affecting trade-union status for guarantees to workmen of the right to bargain collectively and to be represented by persons of their own choice. I am aware of no statutory provision, such as that in the Wagner Act, on majority rule, or any conferring on a government agency authority to designate the unit for which labor representatives can speak.

For one reason or another organized labor in England has also enjoyed comparatively greater success in securing legislation for the general improvement of working conditions. To appreciate what has been accomplished along this line, one need only observe in the British statute books from 1871 onward, how government has taken over, one after another, functions formerly exercised by trade-unions. We note that old-age pensions have replaced or supplemented trade-union super-annuation allowances, that health insurance has replaced or supplemented trade-union sick benefits, and so on as to workmen's compensation, unemployment insurance, hours of work, wages and conditions of employment, *etc.* In our own country it was not until Franklin D. Roosevelt's New Deal that any considerable amount of federal legislation was enacted to secure these elementary and extremely important social ends. So when the editor of *The London Spectator*³⁵ commented not long ago that much of the New Deal social program as embodied in NRA (and as since established in the Social Security legislation³⁶) represents an attempt to catch up with English reforms that go back twenty years and more, he was merely telling the bitter truth.

In our industrial relations, the intervention of government agencies on the labor side, as provided under Section 7 (a) and in the Wagner Act, is a new departure. We are more accustomed to the use of government power on the side of the employer, in the form of injunctions, damage suits, militia-men and soldiers. The frequency and ineffectiveness of labor's appeals to government during the last two years raise doubt as to the usefulness of such appeals. It also demonstrates labor's failure to see that only through its own efforts can it hope to obtain permanent results.

Section 7 (a) of the Recovery Act attempted to improve the position of labor in two ways: it sought to place the legal status of trade-unionism on a more secure footing, and tried to make national in scope certain mini-

ment in any nation of the world, that the labor of a human being is not a commodity or article of commerce, was so inspiring and so fully recognized, it was another emancipation, not by proclamation, but by solemn edict of the Government of the United States." GOMPERS ON LABOR, THE COURTS AND THE LAW, published by the A. F. of L., June, 1921.

35. *The Blow to the New Deal* (1935) 154 THE SPECTATOR 909.

36. P. L. No. 271, 74th Cong., 1st Sess. (1935).

minimum requirements as to hours, wages, and working conditions. The *Schechter* decision³⁷ destroyed what was done in Section 7 (a) toward improving labor's legal status; it set at naught the social accomplishments of the Recovery Act; and also greatly narrowed the constitutional scope of future legislation in both these fields. But long before this judicial ukase, labor's expectations had been blasted by the wholesale manner in which employers, without legal apprehension, flouted the provisions of the Recovery Act.³⁸ At the A. F. of L. Convention of 1934 the bitterest disappointment expressed was over the failure of this Act to fulfill previous political and legislative promises to throw statutory safeguards around the right to organize and bargain collectively through bona-fide trade-union representatives. It is here, the Executive Council moaned, "that the most cruel disillusionment of the workers regarding NRA has occurred."³⁹ So labor leaders, during the last session of Congress, girded their loins and sought to re-establish trade-unionism on a firm legal foundation. The Wagner Labor Disputes Act resulted, the main purpose of it being to remedy defects experienced in the administration of Section 7 (a). What were those defects and how was correction to be made?

After six months as chairman of the National Labor Board, Senator Wagner optimistically assumed that vagueness of language in Section 7 (a) was responsible for the refusal of employers to recognize the rights of their workers.⁴⁰ Dean Lloyd K. Garrison, first chairman of the National Labor Relations Board, while agreeing that the language of the Act needed clarification, pointed out other shortcomings, saying, "I regard this whole problem of providing effective enforcement . . . as of much more fundamental and

37. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

38. After the decision of the National Labor Board in the *Houde Engineering Corp.* case (N. L. B. Decisions, July-Dec. 1934, at 35, P. H. Labor & Unemp. Service ¶ 14,141) the National Association of Manufacturers on September 11, 1934, issued a statement advising, even urging, employers to disregard the Board's ruling and to continue "to abide by the long-standing and authoritative interpretations upholding the right of minority groups to deal with their employers . . . until competent judicial authority has declared otherwise."

The first judicial decision came on February 27, 1935, when Judge Nields of the United States District Court of Delaware declared Section 7 (a) unconstitutional as applied to manufacturers, on the ground that the "relations between defendant and its employees do not affect interstate commerce." *United States v. Weirton Steel Co.*, 10 F. Supp. 55 (D. Del. 1935).

In *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935), the Supreme Court declared Section 3 of the National Recovery Act, 48 STAT. 196 (1933), 15 U. S. C. A. § 703 (1934), unconstitutional. This had the effect of nullifying Section 7 (a), since its provisions were part of codes of fair competition under Section 3.

39. A. F. of L., REPORT OF THE EXECUTIVE COUNCIL (October 1, 1934) 75. "Workers who formed unions," the Report continues, "in good faith . . . found themselves dismissed for no other reason than that they had accepted, at face value, the promises contained in the law; company unions were created by employers to prevent the growth of real unions, and to forestall real collective bargaining. Agencies set up by the N. R. A. for the enforcement of Section 7 (a) were either unwilling or unable to enforce the law, or delayed so long in its enforcement that unions concerned were weakened and even destroyed, and faith in this portion of the act lost."

40. NRA Release No. 3414 (NLB), Feb. 21, 1934, P. H. Fed. Trade & Industry Serv. ¶ 8047.

immediate importance than any changes in and additions to the language of Section 7 (a)."⁴¹ In the framing of the new Wagner Bill, care was taken to remedy deficiencies of draftsmanship and of enforcement machinery. Unfair practices of the employer are more precisely defined, though still not without ambiguity.⁴² Enforcement machinery is strengthened by creating a board with power to subpoena witnesses and records, and to make orders reviewable and enforceable in federal circuit courts of appeal. Though labor entertains certain fears and misgivings as to the outcome (particularly if the new Labor Board should ever be manned by unsympathetic personnel) so far as I am aware, not a single important item which labor leaders or labor sympathizers deemed necessary as part of an effective statute, was omitted from the Wagner Bill. We may therefore expect a reasonable degree of success in its enforcement. Even before this Act received the President's signature, William Green hastened to laud it as another Magna Charta for labor. (England, as I recall, had only one Magna Charta!) Despite such hopeful portents, I venture to submit, in the light of British trade-union technique and experience, that the new Wagner Act will fail of enforcement at the strategic and vital point.

The big idea of this new legislation is to achieve for labor, by the aid of government, the right of collective bargaining. Collective bargaining is made a legal right and several activities of the employers, condemned by Labor Boards as illegal, are now expressly forbidden by specific statutory provisions.⁴³ I am not inclined to quarrel with the Labor Board's numerous interpretations of the collective bargaining provisions in Section 7 (a),⁴⁴ nor to question the design of the Wagner Act to render them effective, but I do question whether the results will be as anticipated by the framers.

One can but deplore the manner in which certain employers sought to defeat or circumvent the collective bargaining provisions of the Recovery

41. Garrison, *Section 7 (a) and the Future* (1935) 24 SURVEY GRAPHIC 53, 54.

42. P. L. No. 198, 74th Cong., 1st Sess. (1935) § 8. For a discussion of this feature of the Act, see Wolman, *The New National Labor Law* (Sept. 1935) 92 REVIEW OF REVIEWS 31.

43. The most significant and far-reaching of the unfair labor practices defined in Section 8 is that which appears in subhead (5): "It shall be an unfair labor practice for an employer . . . To refuse to bargain collectively with representatives of his employees. . . ."

Other "unfair practices" of the employer listed in Section 8 are:

"(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." (Right of employees to organize and bargain collectively through representatives of their own choosing.)

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

"(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act."

44. For a scholarly analysis of the principles established under Section 7 (a) as a result of numerous rulings of the two old Labor Boards, see SPENSER, *COLLECTIVE BARGAINING UNDER SECTION 7 (A)* (1935). A brief summary of these principles was published in pamphlet form by the A. F. of L., December, 1934.

Act.⁴⁵ Prior to 1933 collective bargaining was a phrase of definite meaning, known and accepted by both employers and trade-unionists. For both it meant dealing through independent trade-union representatives and was entirely distinct from any employer-employee relationship in which the company union, works council, or any other management employee representation plan was the device used. Nor was this distinction any more strongly insisted upon by trade-unionists than by industrialists. The late E. K. Hall, vice-president of the American Telephone and Telegraph Company, whom industrialists regard as the dean of their own school of industrial relations, accurately expressed the labor point of view no less than that of employers: Trade-unions, Mr. Hall wrote in 1928, are organized "without invitation from and often in opposition to the wishes of the management," whereas the employee representation plan of labor organization, "is founded with the encouragement and often on the invitation of the management; . . . it is not bargaining; it is dealing; it is collective dealing, if you please, but as I see it, that is very different from bargaining."⁴⁶ In the handbook of *Information for Employees* distributed by the Standard Oil Company of New Jersey, the phrase collective bargaining does not appear prior to 1933. As recently as 1932, John D. Rockefeller, 3d, advocated collective dealing, not collective bargaining.⁴⁷ "More than sixteen years ago," observes an official publication of the Standard Oil Company of New Jersey, "this company laid foundations for a new type of labor policy which afforded employees a method of *collective bargaining*."⁴⁸

The concepts "collective dealing" and "collective bargaining", which formerly were quite antithetical as describing directly opposed types of employer-employee relationship, became completely identified in the minds of certain industrialists, after the enactment of Section 7 (a). "Collective dealing", a phrase originally used to describe a relationship wherein the employer deals with a labor organization which he himself had encouraged and sponsored, was replaced by "collective bargaining", a phrase alleged to meet the requirements of legislative mandate. And it was then claimed that the two

45. For a telling story of the situation, see Beulah Amidon, *Section 7 (a)* (1934) 23 SURVEY GRAPHIC 213.

46. (Feb. 1928) 4 PERSONNEL 77.

The same point of view has been expressed by others: "Some employers now speak of negotiations with their employees exclusively through the medium of shop committees, factory councils, company unions, etc., as collective bargaining. . . . But to apply a term which has been used for decades to connote dealings with an inclusive body of craft or industrial workers having outside affiliations to dealings which are completely confined to one plant or company not only is confusing but readily leads to a deception of both workers and managers as to the basic difference between the two types of negotiation. . . . And to apply the phrase 'collective bargaining' to both types of transactions is to confuse the issues." TEAD AND METCALF, *LABOR RELATIONS UNDER THE RECOVERY ACT* (1933) 123, 124.

47. N. Y. Times, Sept. 20, 1932, at 23.

48. (April, 1933) THE LAMP. Italics are mine.

phrases had always been the same. In this easy fashion "old friends" acquired "new names."⁴⁹

It is not my purpose to question the good intentions of those who helped establish employee representations plans (particularly those antedating NIRA) nor to deny the real benefits accruing to labor under them. For most employers, however, and quite obviously, the motive prompting the establishment of such plans was "good business." There was no thought of endowing labor with any real right to bargain collectively. Before 1933 such agencies did not constitute collective bargaining. No one said they did. The industrialists said they did not. Only by some feat of legerdemain, as yet unperformed, can these plans be now transformed, and I am convinced that it was and is a mistake for employers to stage such magic.⁵⁰

Some industrialists faced the situation more squarely and confessed that their existing employee representation plans did not conform with the requirements of NIRA. They then framed new schemes, admitting that the effort was not made because the management "had a big heart", but because "the law practically required them to do so."⁵¹ There is grave doubt, as I have said, whether employers can make the fundamental changes in company unions needed to meet the requirements of true collective bargaining. This is not to deny company unions all value and merit; they may serve a function, as in England,⁵² but to claim for them, as certain industrialists insist on doing, the exclusive, or even dominant, position as bargaining agent, is tantamount to giving the employer a representative on both sides of the table; in which case labor's bargaining power is not curtailed; it is destroyed.

Closely associated with the Congressional purpose to aid labor in securing the right of collective bargaining is the legislative guarantee of authority to representatives of the majority to speak for all employees. The issue of majority versus minority representation was a most troublesome one

49. See *An Old Friend under a New Name* (Aug. 1933) THE LAMP.

50. The attitude of mind in which industry undertook to meet the legal requirement of collective bargaining through the device of company unions is found in the testimony of Arthur H. Young, Vice-President of the United States Steel Corporation, at the hearings on the Wagner bill.

"THE CHAIRMAN. Did you have any organization [labor] in these plants [Steel] prior to last June [1933]?"

"MR. YOUNG. Practically none; no, sir; except our employes have *good fellowship clubs* in nearly all the plants.

"THE CHAIRMAN. Has the passage of the National Recovery Act and the provision in it known as Section 7 (a) led to the establishment of these organizations [company unions] of your workers?"

"MR. YOUNG. I should think quite definitely, Senator, that it precipitated the action that had been under consideration and discussion for *sometime prior to that*." *Hearings before Committee on Education and Labor on S. 2926, 73d Cong., 2d Sess. (1934) 724*. The record speaks for itself; it need only be added that the U. S. Steel Corporation has long been, and still is, famous for successful resistance to the unionizing activities of labor. Italics added.

51. Volante, *Our Council Plan* (1st quarter, 1934) CO-OPERATION.

52. See, in this connection, C. G. Renold, *Trade Unions or Company Unions?* (1935) 24 SURVEY GRAPHIC 432, suggesting that company unions in America could be made to serve much the same purpose as they do in England.

under Section 7 (a). In one year, there was hardly a public official from the President down who did not try his hand at a final and conclusive interpretation, until the issue literally became confusion worse confounded.⁵³ The National Labor Relations Board unequivocally approved the majority principle⁵⁴ and this ruling is given legislative endorsement in the Wagner Act.⁵⁵ There can be little question as to the soundness of the majority principle in our industrial relations. The right of labor to bargain exclusively through representatives chosen by a majority of the employees is obviously a right which labor should have, and employers should respect that right; the reason given by them for not doing so is mere word-quibbling. Whether Congress can or should undertake by law to fix majority rule for labor, is another question.

Labor has maintained, and Labor Boards have endorsed, the exclusive right vested in representatives of the majority to speak for all employees within the unit "appropriate for the purposes of collective bargaining." The employers, in opposition, have shown surprisingly tender regard for minorities, claiming for themselves as employers the "right", under the provisions of Section 7 (a), to negotiate and make agreements with all comers. Never before especially careful of minority rights, employers are now somewhat absurdly solicitous, urging that it is unfair, undemocratic, un-American, for minorities to be subjected to agreements which they have had no part in making. The insincerity of such employer devotion to the minority principle has been shown time and time again, the *Guide Lamp Corporation Case*⁵⁶ being a famous illustration. Hearing such argument in many labor cases finally outraged Chairman Garrison:

"I am tired of hearing theoretical arguments advanced about the rights of the minority. I have never yet seen a case in which these

53. For details see A. T. Mason, *Labor, the Courts and Section 7 (a)* (1934) 28 AM. POL. SCI. REV. 1003 *et seq.*

54. *In re Denver Tramway Corp.*, N. L. B. Decisions, Aug. 1933-March 1934, at 64, P. H. Labor & Unemp. Service ¶ 14,136.

55. Section 9 (a) reads: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

56. N. L. B. Decisions, July-Dec. 1934, at 47.

In October, 1933, the employees of this company began to join a labor union and sought to negotiate terms with the management. The majority of the employees at that time belonged to a company union. Declining to negotiate with the union representative, the company reasoned as follows: "If we begin the practice of negotiation with each group that presents itself, we will not be complying with the provisions of the N. R. A. . . . any negotiation or collective bargaining must be with the committee representing the great majority of our employees." Quoted by L. K. Garrison, 7 (a) *and the Future* (1935) 24 SURVEY GRAPHIC 53. In less than a year, the employees selected the outside union as their representative and then the company declined to bargain exclusively with union representatives, arguing that both groups must be bargained with. In the ruling on the case, the Board stated the gist of the matter as follows: "The company's insistence upon bargaining with the minority . . . seems essentially . . . a reluctance to bargain collectively at all."

arguments were advanced by *bona fide* minority groups genuinely concerned with negotiating a collective agreement applying to all. They are invariably put forth by employers who do not wish to bargain collectively and who, therefore, wish their responsibility to be kept as diffused and uncertain as possible." ⁵⁷

If only the employer could get the minority principle accepted, the rest, in view of the chaotic and disunited condition of American trade-unionism, would be easy. It is only necessary to have rival labor organizations present a variety of demands so that by playing one against the other no collective bargaining could possibly result. That the employer can do this to such an extent that government is moved to intervene in behalf of the majority principle, is a significant and discouraging commentary on the character and strength of American labor leadership. If labor is ever to be intelligently led and effectively represented, bargaining must be the exclusive right of the majority. There can be no doubt as to that; the contrary view is un-American and absurd. I have never known of a government sending two sets of representatives to negotiate a treaty with a foreign country, one authorized to speak for the majority, the other for a minority.

But even if accepted, the whole significance of the majority rule principle turns on the unit chosen. Under the provisions of the Wagner Act the power and responsibility of deciding between competing units is conferred upon the National Labor Board.⁵⁸ I predict that the controversies under this provision will be among the most difficult which the Board will be called upon to decide, involving fierce battles between company unions and independent labor organizations, and contests between craft and industrial unionists. Also, it may be that there are employees in American industry who do not wish to be represented either by company or by outside unions, but who do desire to avail themselves of direct even if sporadic collective bargaining.⁵⁹ How will the Board decide this issue?

In view of the delicacy of these questions, one may doubt the government's wisdom in entering this field at all. The workers might better be left to decide for themselves what unit they wish to have represent them. For even conceding that a government agency can and should determine the

57. Garrison, *supra* note 55, at 56.

58. Section 9 (b) reads: "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or sub-division thereof."

59. See in this connection Wolman, *The New National Labor Law* (Sept. 1935) 92 *REVIEW OF REVIEWS* 31. Wolman, formerly Chairman of the Automobile Labor Board, argues that though the declared purpose of the Wagner Act is to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, its provisions are as well calculated to stimulate such disputes as was Section 7 (a). In the matter of enforcement, Wolman predicts that that problem under national prohibition was "child's play" compared with the difficulties that are bound to arise in connection with the administration of the new labor law.

bargaining unit, the problem will be next to impossible of solution in cases where wage-earners have not already reached an agreement—a situation, which as everyone knows, is not at all unusual. The wage-earners, thousands of them, in a big modern plant are not in the least like a Yankee “town-meeting.” They have no community, often no common language.

Thus the desire of Congress to safeguard labor in its right to organize and bargain collectively, has led it to assume responsibility even in matters of a minor nature, details formerly considered as lying in the field of routine shop management. Questions of seniority, discharge, lay-off, *etc.*, all become, under recent legislation, subjects of complaint and adjudication. If this practice is continued paternalism may be carried to such a point as to suggest fascism, and little reason will remain for the existence of trade unions of any sort.

I submit that collective bargaining, as I analyze it, offers the most satisfactory approach to the problem of the employer-employee relationship. This requires strong, independent organization on both sides and adequate adjustment or enforcement machinery competent to handle both of them. The building of trade-union organization and power is the work of the employees, not of government. Our brief experience under NIRA proved government’s inability to fight labor’s battle. Only in those industries where unions were strong *before* the enactment of Section 7 (a), such as the building and garment trades, have workers enjoyed any considerable share in determining their own destiny. In the unorganized or poorly organized trades industrial strife continued with undiminished intensity, and employee representation plans flourished.⁶⁰

What, it may be inquired, are the constitutional limits within which government may aid organized labor to build up the economic power of unionism so that employees can bargain on a plane of equality with employers? In considering this question no attempt is made to discuss all the constitutional issues likely to arise under the Wagner Act; rather my purpose

60. For a statistical study of the growth of employee representation under NIRA see NATIONAL INDUSTRIAL CONFERENCE BOARD, *INDIVIDUAL AND COLLECTIVE BARGAINING UNDER N. I. R. A.* (Nov. 1933) and *INDIVIDUAL AND COLLECTIVE BARGAINING* (May, 1934). For a complacent statement of what was achieved for employee-representation under NIRA, see E. S. Cowdrick, *Collective Bargaining in 1934* (Feb. 1934) 13 *PERSONNEL JOURNAL*. “In the field of employee representation”, Cowdrick writes, “1934 was distinctly a successful year. . . . The success of some of these plans has surprised even the friends of employee-representation, to say nothing of those critics who sneered at them as last minute devices to escape unionism.”

A recent authoritative study of the extent and characteristics of company unions shows that sixty-four percent of the unions covered were inaugurated during the period of NIRA. *MONTHLY LABOR REVIEW* (Bureau of Labor Statistics, U. S. Dep’t of Labor, Oct., 1935).

In its report for the six months ending January 9, 1935, the National Labor Relations Board declared that in thirty percent of the eighty-six cases heard by the Board, company unions were a primary or attendant cause of the dispute. All but two of these unions were formed or revived since the passage of the National Recovery Act. *N. Y. Times*, Feb. 13, 1935, at 33.

is to examine certain judicial views, expressed in connection with earlier legislation of a similar character. The Court declared not so long ago that "where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."⁶¹ The "facts and findings" as to our industrial relations, set forth in Section 1 of the Wagner Act, gain weight because of judicial endorsement given in former cases.

Merely to declare in a legislative enactment the right of workers to organize and bargain collectively adds nothing to the sum total of the legal rights of labor. Labor has enjoyed all this as a matter of law since the middle of the nineteenth century. What workers have not heretofore had is legal protection against the discriminatory conduct of employers when they seek to organize and bargain collectively. The important legal step made by recent legislation is not, as many labor leaders seem to think, any legislative declaration of a right to organize and bargain collectively, but rather the legal safeguards thrown around labor activities designed to make these pre-existing rights effective. That Congress has constitutional authority to insist on such conditions as will give substance to labor's lawful rights, there can be no doubt. Prior to 1925, a number of Supreme Court judges had expressed this view though always in dissent. In *Coppage v. Kansas*,⁶² three dissenters, among them Associate Justice (as he then was) Hughes, took this position. Arguing against a denial of due process of law under the Fourteenth Amendment, and in support of legislative authority to declare the policy of the state as to matters which have a reasonable relation to the welfare, peace and security of the community, and to insist on the observance of conditions necessary to make such a policy effective, Justice Day, dissenting, said:

"In view of the relative positions of employer and employed, who is to deny that the stipulation [making non-union membership a condition of employment] here insisted upon and forbidden by law is essentially coercive? . . . Opinions may differ as to the remedy, but we cannot understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power. . . . It would be difficult to select any subject more intimately related to good order and security of the community than that under consideration—whether one takes the view that labor organizations are advantageous or the reverse."⁶³

61. *Radice v. New York*, 264 U. S. 292, 294 (1924).

62. 236 U. S. 1 (1914).

63. *Id.* at 38.

Justice McKenna dissented in a similar vein in *Adair v. United States*⁶⁴ where a provision of the Erdman Act of 1898,⁶⁵ outlawing "yellow-dog" contracts, was invalidated under the due process clause of the Fifth Amendment. After declaring that the facts of history should not be overlooked, nor the course of legislation, Justice McKenna said:

"We are told that labor associations are to be commended. May not then Congress recognize their existence; yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them—maybe controls and impels them—whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed—observed, I may say, not in speculation of uncertain provision of evils, but in experience of evils—an experience which approached to the dimensions of a National calamity. . . . how can controversies, which may seriously interrupt or threaten to interrupt the business of carriers . . . be averted or composed, if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the constitutional right of the carriers. . . . Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition.

.....
 "What did Congress mean? Had it no purpose? Was it moved by no cause? Was its legislation mere wantonness and an aimless meddling with the commerce of the country? These questions may find their answers in *In re Debs*, 158 U. S. 564.

.....
 "A provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system certainly has as direct influence on interstate commerce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employé."⁶⁶

Chief Justice Hughes went far toward reaffirming these views in 1930, when he spoke for a unanimous Court in sustaining an injunction under the terms of the Railway Labor Act of 1926⁶⁷ to protect the rights of labor against the activities of a company union.⁶⁸ The entire judicial history of the *Railway Clerks Case* has such direct bearing on the scope of Congressional authority in our industrial relations as to merit detailed consideration.

64. 208 U. S. 161 (1908).

65. 30 STAT. 424 (1898).

66. 208 U. S. at 185-189.

67. 44 STAT. 577 (1926), 45 U. S. C. A. § 152 (Supp. 1934).

68. *Texas & N. O. R. R. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930).

Since its organization in September, 1918, the Brotherhood of Railway and Steamship Clerks had been authorized by a majority of the clerks employed by the Southern Pacific lines to represent them in all matters relating to their employment. Such representation, moreover, was recognized by the Texas and New Orleans Railway Company; indeed any doubt as to the status of the clerks' union as the bargaining agent was banished by the fact that the management had been carrying on negotiations with it for years. An application for increased wages had been denied, and the controversy which ensued was referred by the Brotherhood to the United States Board of Mediation. While this controversy was pending, the management undertook to supplant the Brotherhood of Railway Clerks and substitute a company union. Pressure was brought to bear on members of the Brotherhood to induce them to withdraw from their own organization and to make the company union their exclusive representative in all dealings with the management. At this point the Brotherhood invoked the following provision of Section 2 of the Watson-Parker Act of 1926: "Representatives, for the purpose of this chapter, shall be designated by the respective parties in such manner as may be provided in their corporate organization, or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by *either party* over the self-organization or designation of representatives by the other."⁶⁹

On the basis of this provision the Brotherhood appealed to Federal District Judge J. C. Hutcheson, Jr., for an injunction restraining officers of the Railroad Company, *inter alia*, from interfering with the Railway Clerks' right to organize and from displacing the clerks' union as the bargaining agent of the workers. After a hearing following the issuance and service of a notice to show cause, the court issued a temporary injunction on July 29, 1927. This order, made permanent April 19, 1928, in substance restrained the railroad, its officers and agents from interfering with, influencing or intimidating any of some 1700 clerical employees in the exercise of their free and untrammelled right of self-organization.⁷⁰ The railroad and the other respondents were also enjoined from interfering with the union's right to select their representatives for deciding disputes between clerical employees and the railroad company.

Evidence shows that officials of the railroad company paid little or no attention to the court's order, whereupon counsel for the Brotherhood went into court with about a hundred counts against the railroad for violation of the restraining order. In the proceedings that followed, (wherein certain of the railroad's officers were found guilty of contempt), the defendants challenged the constitutionality of the Watson-Parker Act, relying on *Coppage v.*

69. 44 STAT. 577 (1926), 45 U. S. C. A. § 152 (Supp. 1934). Italics mine.

70. 25 F. (2d) 873 (S. D. Tex. 1928).

Kansas and *Adair v. United States*. But the court had no doubt that Congress, despite the interference with freedom of contract, could constitutionally provide that in the settlement of disputes each side should be represented by those of its own choice. Any interference with that right was held to be enjoined. "Upon a foundation," the court declared, "laid in direct violation of the statute, they [the railroad and its officers] have sought to erect a superstructure of exclusive representation, and in the face of a statute and an injunction designed to secure the observance of the fundamental maxim, *audita alteram partem*, they have gone about to arrange it so that the railroad would be in a position of surely having a vote on both sides of the table, its own side and that of its employees." ⁷¹

Moreover, the court went so far as to imply that in view of the growing demand for collective bargaining and the legislative and judicial recognition which that right had received, together with the more liberal interpretations given the phrase "liberty of contract", such cases as *Coppage v. Kansas* and *Adair v. United States* might now be decided differently. Judge Hutcheson's argument on this point is significant since his views are almost completely embodied in the "findings and policy" of the Wagner Act:

"When, therefore, on either side of a dispute between an employer engaged in interstate commerce, a recognized subject of federal legislation, and its employees, one asserts, in the face of a statute which puts conditions upon its exercise, that that particular form of liberty, the liberty of contract, the right of the employer to hire and fire, and of the employee to serve or quit, in the absence of contract (the most stubbornly asserted of all the particular liberties), is unrestrainable, he must be prepared, not only to give learned dissertations on the freedom of contract, but to show in the light of established practices employed in the course of this long controversy, and of the judicial and legislative pronouncements on it, that it has not behind it a sufficient force of general public opinion to create an established custom which may be articulated into law.

"If, in a study of the matter, a student of the law, employing in his research induction and deduction, should upon examination find that, rising at first slowly, and then, through the full realization of a common plight, a common cause and a common remedy (the achievement of group solidarity and power through unionization), rushing on tides of feeling, the demand for collective bargaining became a passion with workingmen, and that, begun more than a half century ago, this demand has been asserted and opposed with equal fierceness, and at the cost not only of the blood and treasure of the combatants, but of disturbances of the public peace and prosperity, and that for the greater part of this time this asserted right of collective bargaining has been enjoyed, he would be an ignorant man indeed who would not at once conclude that such a

⁷¹ *Brotherhood of Ry. & S. S. Clerks v. Texas & N. O. R. R.*, 24 F. (2d) 426, 433 (S. D. Tex. 1928).

pregnant struggle could not have been so long waged without giving birth to customs, both capable of and in the interest of the public peace, requiring judicature.

"He would not have been surprised to find the history of the origin, growth, and change of such customs replete with legislative and judicial pronouncements. He would find that, beginning more than 40 years ago, six times has Congress legislated directly upon the subject; that in cases without number the courts have issued their injunctions declaring and vindicating judicial power to protect the commerce of the country from the anarchy and disruption arising out of these fierce labor disputes. . . .

"He would find that in *Adair v. United States*, 208 U. S. 167, a majority of the Supreme Court of the United States had not been able to see that the custom of balancing the concentrated power of the employer, on the one hand, by the concentrated power of the employee, on the other, in negotiating wage and working agreements, which custom the Congress sought in the interest of the preservation of the even flow of commerce and the public peace to bring out of the field of mere custom into that of the law, had so established itself as to become justiciable. But he would also find that others of the judges dissenting, could not see how the 'liberty through sheer antipathy' to bring on a struggle which would disrupt commerce could be paramount to public interest and he could but wonder at least if this were not so."⁷²

From the decision of the district court, the railroad company appealed to the United States circuit court where the judgment was affirmed.⁷³ Here also the court based its decision on the provisions of the Watson-Parker Act quoted above. Counsel for the appellants argued that to give this provision the effect of conferring on the employees of a carrier a judicially enforceable right was inconsistent with the Court's decision in *Pennsylvania System & Federation v. Pennsylvania R. R.*⁷⁴ But Judge Walker, speaking for the court, denied that this decision governed the case at bar. He said:

"Though under the Railway Labor Act, it is optional with carriers and their employees to agree or not to agree to use the means provided for by the act for the settlement of disputes, it is not optional with either to violate rights conferred on the other by the act. The provision in question indicates the unwillingness of Congress to provide machinery for the settlement of disputes between carriers and their employees by the voluntary action of the parties without at the same time providing for the representative acting for each party in agreeing to a prescribed method of settlement being one chosen by that party without interference, influence, or coercion exercised by the other party. The violation of a duty created by statute, resulting in damage to one of the class for whose benefit the duty was imposed, confers a right of action upon the

72. *Id.* at 429.

73. *Texas & N. O. R. R. v. Brotherhood of Ry. & S. S. Clerks*, 33 F. (2d) 13 (C. C. A. 5th, 1929).

74. 267 U. S. 203 (1925).

injured person, though the statute makes no provision as to a remedy for such a wrong.”⁷⁵

The contention of the appellant that brought forth the most interesting observation of the circuit court was that the injunction in this case violated the anti-injunction provision of the Clayton Act in that it was not issued to protect a property right.

“It may be assumed that that provision [Section 20] governs applications for injunctive relief by both employers and employees, though there is some ground for concluding that in enacting the provision Congress had in mind applications for such relief by employers only.

The term ‘property right’ is broad enough to include the right to make contracts for the acquisition of property, by the rendition of services, or otherwise, and the right of an employee to money or other property exchanged, or to be exchanged, for his services. . . . It hardly would be denied that injury to a property right of one would result from keeping him from realizing as much income from his occupation or business, though it consists in rendering personal services for compensation, as he could have earned if his freedom of acting and contracting had not been interfered with. *We are of the opinion that, within the meaning of the provision now under consideration, injury to property rights of members of a group of employees would result from conduct of their employer having the effect of such employees, in dealings between them and their employer with reference to terms and conditions of employment, having a representative subject to the domination or selfish influence of the employer, as a probable consequence of employees being so represented would be their failure to fare as well financially as they would have fared if they had been represented by a loyal agency intent on promoting their interests.*”⁷⁶

Far reaching implications of much importance to labor may be drawn from this ruling. Employees have a financial, a property interest, in having a representative to act for them free from the coercive influence of the employer. This is a property interest, moreover, that is entitled, when threatened, to equitable protection. Since the right to work is a property right, and since the right to negotiate about work is also a property right, both may be safeguarded by an injunction against blacklists, lockouts, and other discriminatory conduct. It follows that whenever a company union, as in the *Railway Clerks Case*, prevents the workers from faring as well financially as they would when represented by their own organization, such an agency denies them a property right which courts of equity will protect against such infringements.

75. *Texas & N. O. R. R. v. Brotherhood of Ry. & S. S. Clerks*, 33 F. (2d) 13, 16 (C. C. A. 5th, 1929).

76. *Id.* at 17. Italics mine.

When the *Railway Clerks Case* came before the Supreme Court, Chief Justices Hughes used unequivocal language in sustaining the authority of Congress to safeguard labor in its right to organize and bargain collectively against the discriminatory conduct of employers.

"The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209. Congress was not required to ignore this right [to organize and bargain collectively] but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." ⁷⁷

Continuing, the Chief Justice observed:

"The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. . . . The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization'. The phrase covers the abuse of relation or opportunity so as to corrupt or override the will. . . ." ⁷⁸

Clearly one should not apply the *Railway Clerks Case*, however imposing it may be as a precedent for Congressional legislation, to situations which at first glance appear analogous. Of first importance is the fact that this case involved a special statute. Furthermore, this decision can be used as a precedent only in an industry where denial of the legal right of independent self-organization would directly affect, burden or obstruct interstate commerce; or where the organized power of labor is established, and where also there is no dispute among the workers themselves as to who are their legitimate

⁷⁷ *Texas & N. O. R. R. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 570 (1930).

⁷⁸ *Id.* at 568.

Johnson and Richberg in their statement of August 23, 1933, announced that the "rulings of the Supreme Court lay down the law which governs the N. R. A.", and pointed out that "the conduct of employers which is here prohibited has been defined in the case entitled *T. & N. O. R. R. v. Brotherhood of Railway Clerks*, 281 U. S. 548." *N. Y. Times*, Aug. 24, 1933, at 4.

representatives for purposes of collective bargaining. This case also leaves unsettled the troublesome question as to who are the bona-fide representatives in situations where there are divisions among the workers. The Labor Boards have repeatedly held that persons chosen by the majority constitute the exclusive representation of all workers within appropriate bargaining units.⁷⁹ This rule has now been embalmed in one of the provisions of the Wagner Act,⁸⁰ and a government agency is endowed in case of dispute with power to decide which among the competing units is the one "appropriate for purposes of collective bargaining." Mr. Justice Pitney's observations in the *Hitchman Coal Case* cast some doubt on the constitutionality of this provision:

"Whatever may be the advantages of 'collective bargaining', it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union."⁸¹

The last phrase of this statement is overruled in both the *Norris-LaGuardia*⁸² and the *Wagner Labor Disputes*⁸³ Acts, and there is good reason to believe that this outlawry of the "yellow-dog" contract will pass the test of constitutionality.⁸⁴ This Congressional banning of anti-union contracts is constitutional if it be regarded (as obviously it should be) as part and parcel of the more general provisions guaranteeing the workers freedom

79. *In re Denver Tramway Corp.*, N. L. B. Decisions, Aug. 1933-March 1934, at 64, P. H. Labor & Unemp. Service ¶ 14,136.

80. Section 9 (c).

81. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 250, 251 (1917).

82. 47 STAT. 70 (1932), 29 U. S. C. A. § 103 (Supp. 1934).

83. Section 8 (3).

84. No provision of the National Labor Relations Act is so well known in judicial history as Section 8, paragraph 3, making it illegal for an employer by means of employment, "to encourage or discourage membership in any labor organization." The first enactment on the subject was passed in 1898, 30 STAT. 424, 428 (1898), when Congress made it a criminal offense for interstate commerce carriers to make a non-union contract with their employees. This statute was declared unconstitutional in *Adair v. United States*, 208 U. S. 161 (1908), as was a similar state enactment in *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073 (1906), as an arbitrary interference with liberty of contract. In 1917, the Supreme Court sustained an injunction to protect a "yellow-dog" contract against the organizing activities of a labor union. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917). Despite the legal support which the Court has given this noxious form of labor agreement, several statutes, passed recently, declare such contracts contrary to public policy. Although the offending employer, under this legislation, is not criminally indictable, he is denied access to a court either of law or equity to secure enforcement of the contract. The first such statute was passed in Wisconsin in 1929. WIS. STAT., c. 130, § 46 (1931). More than a dozen states have since passed similar legislation. In like manner, the *Norris-La Guardia Act* of 1932 declares the "yellow-dog" contract opposed to public policy and prohibits federal equity courts from taking jurisdiction in suits brought to secure its protection. 47 STAT. 70 (1932), 29 U. S. C. A. § 103 (Supp. 1934).

The National Labor Relations Act goes further, as did Section 7 (a), and makes the "yellow-dog" contract illegal and indictable. This legislation indicates the drift of public opinion regarding this form of labor agreement.

from interference, restraint and coercion by employers in the exercise of their lawful right of self-organization. But other parts of Justice Pitney's statement will doubtless stand the judicial test despite those provisions of the Wagner Act that seem to invalidate them. For if collective bargaining is not, as Mr. Justice Pitney says, bargaining at all unless it is voluntary, those who remain non-union and constitute a minority are deprived of freedom of contract under a statute which forces them to accept conditions of work as established by representatives of the majority.

One may experience even greater difficulty in seeking judicial precedent for the much-discussed paragraph 5 of section 8 declaring it "an unfair practice" for an employer "to refuse to bargain collectively with representatives of his employees." Precisely what does this provision require of the employer? If it demands no more than a greater degree of congeniality in his dealing with employees, that he merely sit and listen to the appeals of his workmen, it is, obviously, of little value. Construed as a positive legal obligation, its constitutionality is doubtful. If, in other words, this section requires the employer, as the National Industrial Relations Board held under Section 7(a), "to match their [union representatives] proposals, if unacceptable, with counter proposals,"^{84a} the Supreme Court will be likely to interpose its veto.

84a. *In re Houde Engineering Corp.*, N. L. B. Decisions, July-Dec. 1934, at 35. The full statement of the Board on this point follows: "The right of employees to bargain collectively implies a duty on the part of the employer to bargain with their representatives. Without this duty to bargain the right to bargain would be sterile. . . . The employer is obligated by statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter proposals; and to make every reasonable effort to reach an agreement. Collective bargaining, then, is simply a means to an end. The end is agreement."

To the same effect the Board ruled in *In re Eagle Rubber Co.*, N. L. B. Decisions, July-Dec. 1934: Section 7 (a) imposed on the employer the duty "to enter into collective bargaining negotiations with an open mind to match unacceptable proposals with counter proposals and to exert every reasonable effort to reach an agreement binding for an appropriate term." At p. 157.

In discussing section 8, paragraph 5, Dean W. H. Spenser follows the Labor Board's construction of Section 7 (a). See his monograph. *THE NATIONAL LABOR RELATIONS ACT (1935)* 21 *et seq.*

Quite a different construction is placed on this section by Professor D. A. McCabe, an interpretation which makes it mean something to the workers and eliminates much of its taint of unconstitutionality. He writes:

"What this clause really means is not that the employer must bargain 'collectively' (which seems a contradiction in terms) but that he must not refuse to allow his workers to bargain collectively with him if they wish. It is concerned with the form of bargaining on the workers' side. To make it clear that the choice whether the workers shall negotiate collectively now belongs in law to the workers and not to the employer, it prohibits the employer from refusing to deal through the medium chosen by the workers, when that choice is the choice of a majority.

"Obviously this statutory prohibition upon the employer does not insure the fixing of the terms of employment by an agreement between the employer and his workers collectively. The prohibition does not extend to a refusal by the employer to concede terms acceptable to the workers. And the Act leaves the workers as free as before to refuse the terms offered by the employer. It is concerned with the form of negotiation, not with the outcome of the negotiations, with the establishment of the right of the workers to choose the channel of negotiation regardless of the wishes of the employer, not with the securing of agreements." *THE NATIONAL LABOR RELATIONS ACT (1935)* 4-5.

As every one knows, "liberty of contract" is not always so complete that it may not be regulated to protect and promote the general welfare. Circumstances have, in fact, justified Congress in protecting the public interest against "injury resulting from failure to exercise the private right" of negotiation and agreement between employers and employees as to wages and hours.⁸⁵ But it is doubtful whether government, under the above provision, can lawfully compel employers to negotiate and reach agreements with their workers; constitutional support will be found wanting.

If this is to be done, the Court may have to endorse the proposition that trade unions are public welfare institutions, and as such entitled to legal and governmental sanction. Court opinions afford no support for this; rather they point to the opposite conclusion. Trade unions, the Supreme Court holds, "are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern, to the general welfare."⁸⁶ Desirable as it is as a matter of policy, to establish collective bargaining, labor cannot enjoy it even as a matter of law in cases where it does not possess it as an economic fact. It is one thing for organized labor to enjoy the right to bargain collectively in economic fact; it is quite a different thing to gain such right as a gift from Congress. The attempt of government (if made) to force agreements between employers and organized labor is not very different from a statute outlawing strikes; both smack of compulsory arbitration, and the compulsory method of dealing with the industrial problem has found little favor with the Supreme Court.⁸⁷

Here a limit is reached beyond which Congress cannot and should not go in its effort to equalize labor's bargaining strength. But it does not follow that this entire realm of economic conflict is one in which judicial views as to what is economically and socially desirable, should remain final and controlling. If there are practical as well as constitutional limits to what Congress can do effectively in the industrial field, the jurisdiction of the courts in the same area is even more narrowly restricted. It should not be necessary at this late date to urge that "Congress, not judges, is the body which should declare what public policy in regard to the industrial struggle demands."⁸⁸ The language quoted is that of Justice Brandeis dissenting in the *Duplex Case*. Continuing, he said:

85. *Wilson v. New*, 243 U. S. 332, 353 (1917).

86. *Coppage v. Kansas*, 236 U. S. 1, 16, 17 (1915).

87. Compulsory arbitration involves extraordinary restrictions on liberty and property, and if justified, even when used in public utilities and interstate commerce, it must be attended by circumstances of an ominous nature. It required "a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial paralysis and grave loss and suffering over-hanging the country," to sustain the Adamson Act [39 STAT. 721 (1916), 45 U. S. C. A. § 65 (1928)], which, even then, "went to the border line" of constitutionality. *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 544, 544 (1923), discussing *Wilson v. New*, 243 U. S. 332 (1917), which held the Adamson Law constitutional.

88. *Duplex Printing Co. v. Deering*, 254 U. S. 443, 485 (1921).

"By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of *injuria* from the damages thereby inflicted, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or a legal injury, because in their opinion, economically and socially objectionable." ⁸⁹

In this process of establishing economic balance, government may aid. Congress may declare labor's right to bargain collectively. If the federal government may, without statutory authorization, appeal to a court of equity, as it did in the *Debs* case, to protect commerce from imminent damage and interruption, surely Congress can provide such precautionary measures as will safeguard it from anarchy and disruption. In pursuance of this purpose Congress can protect the workers against such discriminatory acts as would render collective action a "mockery"; ⁹⁰ it has already made "yellow-dog" contracts both unenforceable and criminal. All this is within the power of Congress both as a practical and as a constitutional matter.

The new labor legislation errs, as we have seen, in going too far, but in certain respects it does not go far enough. Coercion and intimidation by labor unions, whether directed against employers, non-union workers, or the public, was not specifically forbidden by Section 7 (a), nor enjoined under the Wagner Act. A suspicion that 7 (a) was somewhat one-sided in this respect may have prompted the President, in his settlement of the threatened automobile strike, to observe that "the government makes it clear that it favors no particular union or particular form of employee organization or representation. The government's only duty is to secure absolute and uninfluenced freedom of choice without coercion, restraint or intimidation from any source." ⁹¹ In the settlement of the Atlantic and Pacific chain stores dispute, the National Labor Relations Board observed: "There must be no coercion or intimidation by any of the unions to compel any man to join a union." ⁹² All this might doubtless be said under the Wagner Act.

Defenders of the Act also point out that there was no need for specific Congressional condemnation of the coercive and criminal acts of organized labor since these are indictable under existing law. But conceding this to be

89. *Id.* at 485, 486.

90. Labor could make much greater use of the injunction in its battles against the employer. For a consideration of the effectiveness with which labor may itself appeal to equity courts in labor disputes, see A. T. Mason, *Organized Labor as Party Plaintiff in Injunction Cases* (1930) 30 COL. L. REV. 466.

91. N. Y. Times, March 26, 1934, at 1, 2.

92. *Id.*, Nov. 4, 1934, § 1, at 1.

true, it is obviously preferable that legislation be drafted in such a way as not even to seem to condone arbitrary conduct affecting employers, employees, or the public at large. Whether one's primary concern is for the general welfare or for trade unionism, this failure to condemn unlawful acts of labor is of doubtful wisdom. From English experience revealing light is to be had on this aspect of the subject.⁹³

Though the Wagner Act, as we have seen, confers power on the National Labor Board to proceed against offending employers, no authority whatever is granted the Board to take disciplinary action against labor unions making arbitrary and unreasonable demands. A strike called to force compliance with such demands is not forbidden since the statute expressly declares that "nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."⁹⁴ But organized labor should be reminded that despite the far-reaching nature of the Wagner Act, the doctrine of criminal conspiracy, as embodied in the anti-trust acts, still stands. Because of this doctrine, labor objectives, however laudable in themselves, are rendered criminal whenever illegal means are used to reach them; and means otherwise lawful may be criminal because of unlawful motive or purpose. It was Mr. Justice Brandeis, speaking for a unanimous Court, who ruled:

"The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose."⁹⁵

Whether the criticism is well founded that American unions are little better than rackets, I am not in a position to say, but I do know that such a belief exists and that it is widely held even in labor circles. The A. F. of L. committee on racketeering, in a recent report to the executive council, acknowledged its presence in certain unions and expressed willingness to

93. Encouraged by the legal immunities granted by parliamentary legislation from 1871 on, and especially by the hastily drawn act of 1913 for dealing with injustices arising from the Osborne judgment (see *supra* note 19), British labor in May, 1926, staged a general strike of threatening proportions. The result was enactment of the reactionary TRADE DISRUPTERS AND TRADE UNIONS ACT, 17 & 18 GEO. V, c. 22 (1927), which seemed at the moment to jeopardize, if not destroy, legislative gains over a period of fifty years. There was a shrill outcry from the Labor Party that the act was an attack on the right of association and the right to strike. Though this was never quite true, the general strike did lend support to the argument in favor of a more restrictive labor statute, and conservatives seized this opportunity to gain legislation for which they had been clamoring since 1913. The exact scope of the act is undetermined, since it has not yet been subjected to judicial decision. Nevertheless, the legislative efforts of labor are still directed to its repeal.

94. Section 13.

95. *Dorchy v. Kansas*, 272 U. S. 306, 311 (1926). For discussion of the constitutional limitations of the right to strike, see Mason, *The Right to Strike* (1928) 77 U. OF PA. L. REV. 52.

co-operate with the United States Attorney-General in efforts to stamp it out.⁹⁶ Until this is done, the attempt of organized labor to play a role in the industrial process similar to that of British unions, will continue to be embarrassed by the typical employer's retorts which might be put as follows:

That may be all very well in England. There labor unions are responsible bodies, wisely led. They really represent the workers of the country. Ours represent only a few dissatisfied radicals organized by agitators who are out to get something for themselves.

Certainly if employers are required by law to recognize labor unions, then they are entitled to government protection against "radicals", rascals, and racketeers. Requirement of the publication of trade-union accounts, audited under government supervision, might in time eliminate many elements of graft and racket. Other measures corrective of trade union abuses must be found; but the remedy is not opposition to unions as such.

I consider both Section 7 (a) and the Wagner Labor Disputes Act, in certain respects unfortunate. Such legislation is of value as a declaration of the policy on the basis of which our industrial relations must be built. It recognizes that the relations between workingmen and employers of labor are competitive in nature, that organized competition is not harmful, and that the facts of our industrial situation make it necessary to restrict in certain respects the rights and powers of employers so as to correspond in substance to the powers and rights of trade unions. Insofar as the Wagner Act is designed to safeguard the workers in their right to organize and bargain collectively, free from the interference of employers, it is sound legislation. This statute is defective in attempting too much; in entering conflicts that do not admit of governmental settlement. It does not distinguish sufficiently between the nature of government and the nature of an organized economic group; it fails to differentiate sharply those functions which belong to government from those which must be left to trade unions.

I endorse collective bargaining as sound public policy but insist that legislative fiat to achieve it is not enough. That industrial peace in a democratic society necessitates the right of labor to organize and bargain collectively through independently chosen representatives, that such representative should be accorded the right to speak for all employees when constituting a majority of the unit deemed appropriate, there can be no doubt. I seriously question, however, whether it is the business of government to secure these desirable ends in the manner provided in this recent legislation.⁹⁷

96. N. Y. Times, Oct. 7, 1935, at 1, 2.

97. Something of the point of view here given is stated in L. K. Garrison's article, *New Techniques in Labor Settlement* (1935) 29 SURVEY GRAPHIC 159. ". . . I am certain that any forward step in labor relations," Dean Garrison writes, "must be taken by industry and labor acting jointly in the development of new techniques for adjusting their differences, and that it is folly to expect too much of the government." At 199.

In the industrial battle American labor has always depended too much on government support and too little on setting its own economic house in order and on organizing its own full strength. There is nothing in these recent enactments effectively calculated to correct this fault. If collective bargaining is to be effective there must be the support of a strong, disciplined labor movement under competent leadership; and so far, organized labor and organized capital, though surely hostile enough, have co-operated to abort this result. Until strong, united and responsible organization is established on both sides, governmental measures, such as Section 7 (a) and the Wagner Act, will only serve to draw more sharply the issues as to trade-unionism versus company unionism, collective bargaining versus individual agreement, *etc.*; which result perilously exaggerates the elements of conflict already only too inherent and apparent in the employer-employee relationship.

There is every reason to believe that a most important result of these recent labor laws may be improvement in the operation of employee-representation plans. Employers are bound to try to bring their own plans into conformity with legislative requirements, and if they are able to do so, and if they gain the support of a majority of their employees, the "Magna Charta" of the A. F. of L. will actually have the effect of making it more difficult for outside unionists to organize such plants.⁹⁸ In view of this possibility, even probability, it is hard to see why labor should be so optimistic about the new Wagner Act, and equally hard to see why industrialists should be so alarmed at the re-enactment of provisions which they successfully circumvented or ignored under NIRA.

It is evident, therefore, that the federal government cannot do much in promoting collective bargaining until organized labor has first shown the employer that the union exists, and perhaps the most convincing demonstration of such existence is ability to call out enough workers to bring the plant to a standstill. Until a trade union is in a position to wage successful battle of this sort, it is not in any position to bargain with the employer. Of course this is not comfortable doctrine; and, furthermore, as long as there are ten or twelve million workers unemployed, this entire discussion is largely academic. The doctrine is, nevertheless, objective.

98. See S. H. Slichter's suggestive article, *The Outlook for Labor Relations under the Wagner Industrial Disputes Act* (1935) 46 THE ANNALIST 78.

Professor Slichter overlooks the possibility of company unions getting out of hand and freeing themselves of company domination. Events recently took this unexpected turn when the company unions in the steel, rubber and automobile industries (all set up under NRA) threatened to link up these individual plant company unions into national unions. Should these unions get out of hand, the way will be clear for an independent unionism of unprecedented strength. Thus, ironically enough, the employers will have contributed to trade unionism that element of strength which labor leadership had until recently failed to supply. Industrialists may now recall the warnings of General Hugh Johnson in 1933—that their feverish haste in organizing company unions to circumvent the Recovery Act would react in the form of "a Frankenstein that will ultimately override you." N. Y. Times, Oct. 27, 1935, § 1, at 16.

In the administration of the Wagner Act, or of any similar legislation, the government may follow one of two policies, neither of which is likely to produce the results desired. It may allow, as it did under Section 7 (a), wholesale disregard of the Act's provisions; or, insist on strict enforcement. The probable effect of the first course would be widespread industrial disputes, and an appeal on the part of labor for an even more far-reaching "Magna Charta." Should the administration adopt the policy of strict enforcement, which is not at all likely, it might well be that the A. F. of L., in view of its lack of responsible organized power, and of its incompetent and shortsighted leadership, would "go along" and become a meek sort of government-run labor organization, in nature essentially and obediently fascist. Neither employers nor workers intend such a result, but "the road to hell is paved with good intentions", and both sides will have aided in preventing the establishment of those foundations on which alone sound industrial relations can be built.